

ADR

Background

*History

*Legislation

*Policies

History

- ◆ Early American Community Programs
- ◆ Pennsylvania Arbitration Statute 1705
- ◆ Labor Movement early 1900's
- ◆ U.S. Arbitration Act 1925
- ◆ Creation of Federal Mediation and Conciliation Service (FMCS) 1947

History cont.

- ◆ Creation of the Boards of Contract Appeals 1950's
- ◆ Creation of Administrative Conference of the U.S. (ACUS) 1964
- ◆ Development of Community Mediation Programs 1970's

History cont.

- ◆ Agency Experimentation in the Procurement World 1980's
- ◆ Creation of Groups Like National Institute of Dispute Resolution and Center for Public Resources 1980's
- ◆ Passage of the Administrative Dispute Resolution Act of 1990

History cont.

- ◆ Alternative Dispute Resolution Pledge of May 16, 1994
- ◆ Passage of the Administrative Dispute Resolution Act of 1996



Legislation

Administrative Dispute Resolution Act of 1990

- ◆ Pub. L. No. 101-552, 104 Stat. 2736 at 5 U.S.C. §§571-583
- ◆ Required Each Agency to Establish ADR Policy
- ◆ Required Consultation with ACUS and FMCS

ADR Act of 1990 cont.

- ◆ Required Agencies to Review ADR Possibilities in Connection with all Administrative Procedures
- ◆ Required Agencies to Designate a Dispute Resolution Specialist
- ◆ Required Agencies to Develop ADR Training Programs

ADR Act of 1990 cont.

- ◆ Required Agencies to Review Contracts and Agreements for Grants for Use of ADR
- ◆ Created General Authority for Use of ADR
- ◆ Authorized the Use of Volunteer Services

ADR Act of 1990 cont.

- ◆ Created Framework of Confidentiality
- ◆ Created Binding/Non Binding Arbitration Procedure
- ◆ Required Reporting to ACUS
- ◆ Defined Terms

ADR Act of 1990 cont.

Problems

- ◇ Definition of “Alternative Means of Dispute Resolution” Included “settlement negotiations”
- ◇ Lack of FOIA Exemption
- ◇ Arbitration Provisions Ineffective

ADR Act of 1990 cont.

Problems

- ◆ Required Claim Certification of \$50k
- ◆ Contained a Sunset Provision

Administrative Dispute Resolution Act of 1996

- ◆ Pub. L. 104-320, 110 Stat. 3870 at 5 U.S.C. §§571-583
- ◆ Permanently Reauthorizes the ADR Act
- ◆ Adds Limited FOIA Exemption for Communication with the Neutral
- ◆ Deletes “settlement negotiations” from ADR Definition

ADR Act of 1996 cont.

- ◆ Authorizes Use of Binding Arbitration
- ◆ Requires the President to Designate Agency or Create Inter-Agency Committee to do Work of ACUS
- ◆ Provides for Use of Noncompetitive Procedures to Acquire Neutrals

ADR Act of 1996 cont.

- ◆ Claim Certification in Concert with Contract Disputes Act
- ◆ Redefines Protest Jurisdiction of Court of Federal Claims and District Courts

Negotiated Rulemaking Act of 1990

- ◆ Pub. L. 101-648, 104 Stat. 4969 at 5 U.S.C. §§561-570
- ◆ Incorporated ADR Techniques into Rulemaking Process
- ◆ Codified Process of Non-government Entities Involvement in Agency Rulemaking

Rulemaking Act cont.

- ◆ Permanently Reauthorized by ADR Act of 1996
- ◆ New Provision Allows for Expedited Hiring of Conveners and Facilitators

Judicial Improvement Act of 1990

- ◆ Pub. L. No. 101-650, 104 Stat. 5089
- ◆ Gives Federal Courts Power to Refer Cases to ADR Programs
- ◆ Stimulated Growth of Court Annexed ADR



Policies

Department of the Navy Policy

- ◆ Lehman Memorandum of 23 December 1986
 - ◆ Established Navy Test Program
 - ◆ Guidance of General Counsel
 - ◆ All Contracts Disputes Reviewed for ADR
 - ◆ All Final Decisions Reviewed for ADR

Navy Policy cont.

- ◆ Pyatt Memorandum of July 13, 1987
 - ◆ Make Sure Lehman Memorandum is Followed
 - ◆ Disputes >\$25k Contracting Officers to Review for Use of Mini-Trial
 - ◆ Disputes <\$25k Contracting Officers to Afford Contractors Use of Summary Binding Process

Navy Policy cont.

- ◆ SECNAVINST 5800.13 “Alternative Dispute Resolution”
 - ◆ ADR Shall Be Used to Maximum Extent Practicable
 - ◆ Echelon I and II Activities Promulgate ADR Guidance
 - ◆ Echelon I and II Activities Designate ADR Specialist

SECNAVINST 5800.13 cont.

- ◆ Echelon I and II Activities Submit Yearly ADR Reports
- ◆ All Activities Review Existing Approaches to Dispute Resolution
- ◆ Creation of Navy ADR Specialist and Deputy Specialist

DoD Policy

- ◆ DoD Directive 5145.5 “Alternative Dispute Resolution”
 - ◆ Requires Each DoD Component to Establish and Implement ADR Policies and Programs
 - ◆ Requires Each DoD Component to Use ADR Whenever Appropriate
 - ◆ Puts DoD General Counsel in Charge of ADR Effort

DoD Directive 5145.5 cont.

- ◆ Creates an ADR Coordinating Committee
- ◆ Requires Each DoD Component to Designate ADR Specialist
- ◆ Requires Each DoD Component to Provide ADR Training

Executive Order 12988

“Civil Justice Reform”

Feb. 5, 1996

- ◇ Litigation Counsel Shall Make Reasonable Efforts to Resolve Disputes Before Trial
- ◇ Litigation Counsel Should Suggest Use of ADR
- ◇ Litigation Counsel Should be Trained in ADR

Department of Justice Order OBD 1160.1 Spring 1995

- ◆ Creates Position of Senior Counsel for ADR
- ◆ Requires Each DoJ Component to Provide ADR Guidance to Attorneys
- ◆ Requires Each DoJ Component to Establish ADR Policy to Include Expectation of ADR Use

DoJ Order cont.

- ◆ Requires DoJ Attorneys to Get ADR Training
- ◆ Requires DoJ Components to Periodically Review ADR Guidance
- ◆ Requires DoJ Components to Maintain Statistics

Report of the National Performance Review Sept. 7, 1993

- ◆ Agencies Required to Expand Use of ADR
- ◆ Concludes ADR Saves Time and Money
- ◆ Concludes Use of ADR Avoids Generating Ill Will

Executive Order 12979 “Agency Procurement Protests” Oct. 27, 1995

- ◆ Agencies Required to Establish ADR Process for Protests
- ◆ Review of Procurement at Level Above Contracting Officer
- ◆ Prohibit Award or Performance While Protest is Pending

EEOC ADR Policy Statement

July 17, 1995

- ◆ ADR Will Complement the Current System
- ◆ ADR is Fully Consistent with EEOC's Mission
- ◆ ADR is Voluntary
- ◆ Agreement Reached Through ADR Must Be Enforceable

ASBCA ADR Policy

- ◆ Suggests Parties Consider ADR
- ◆ Requests to Use ADR Must be Jointly Made
- ◆ Board Judge May Suggest ADR
- ◆ Board Will Provide Neutral

ASBCA Policy cont.

- ◆ ADR Proceeding Concluded within 120 Days of Approval
- ◆ Types Preferred
 - ◆ Settlement Judge
 - ◆ Mini-trial
 - ◆ Summary Trial with Binding Decision
 - ◆ Innovative Ideas

FAR Part 33

- ◆ Agencies to Use ADR to the Maximum Extent Practicable
- ◆ ADR Procedures May Be Used at Any Time Contracting Officer has Authority to Resolve Controversy
- ◆ Rejection of ADR Request Requires Written Explanation

Other Policies

- ◆ GAO
- ◆ GSBCA
- ◆ Individual Activities